

**MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

United States District Court	District Eastern District of North Carolina
Name (under which you were convicted): Pammy Gail Cummings	Docket or Case No.: 7:02-CR-72-BO-1
Place of Confinement: FPC Alderson-Federal Prison Camp	Prisoner No.: 23071-056
<div style="display: flex; justify-content: space-between;"> UNITED STATES OF AMERICA Movant (include name under which you were convicted) </div> <div style="display: flex; justify-content: space-between; margin-top: 5px;"> v. Pammy Gail Cummings </div>	

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

U.S. District Court, Eastern District of North Carolina
Wilmington, North Carolina

(b) Criminal docket or case number (if you know): 7:02-CR-72-BO-1

2. (a) Date of the judgment of conviction (if you know): 8/5/2002

(b) Date of sentencing: 1/22/2003 and 10/16/2008 (Rule 35)

3. Length of sentence: Count 1- 240 months and Count 4-120 months (concurrent)

4. Nature of crime (all counts):

Count 1-21:846 Conspiracy to Possess with Intent to Distribute at Least 500 Grams of Cocaine
Count 2-21:841(a)(1) Possess with Intent to Distribute at Least 500 grams of Cocaine.
Count 3-18:922(g) Possession of Firearm by Convicted Felon.
Count 4-18:922(g) Possession of Firearm by Convicted Felon.
Count 5-21:853-Criminal Forfeiture.

5. (a) What was your plea? (Check one)

(1) Not guilty ☐ (2) Guilty ☒ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

Entered plea to Count(s) 1 and 4.
Count(s) 2 and 3 dismissed.

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☒ No ☐
8. Did you appeal from the judgment of conviction? Yes ☒ No ☐
9. If you did appeal, answer the following:
- (a) Name of court: Fourth Circuit Court of Appeals
 - (b) Docket or case number (if you know): 03-4165
 - (c) Result: Dismissed in part and affirmed in part.
 - (d) Date of result (if you know): 1/5/2006
 - (e) Citation to the case (if you know):
 - (f) Grounds raised:

- (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If "Yes," answer the following:

- (1) Docket or case number (if you know):
- (2) Result:
- (3) Date of result (if you know):
- (4) Citation to the case (if you know):
- (5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: Eastern District of North Carolina
- (2) Docket or case number (if you know): 7:06-CV-122F
- (3) Date of filing (if you know): 8/10/2006 Motion to Vacate 28:2255

(4) Nature of the proceeding: 28 U.S. § 2255

(5) Grounds raised:

Robeson County Deputies/Sheriff Corrupt.

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☒

(7) Result: Voluntarily dismissed because Rule 35 Motion withdrawn.

(8) Date of result (if you know): 8/20/2008

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: Eastern District of North Carolina

(2) Docket or case number (if you know): 7:02-CR-72-BO-1

(3) Date of filing (if you know): 3/14/2011

(4) Nature of the proceeding: Motion to Amend -Treated as 28 U.S.C. § 2255 by Court.

(5) Grounds raised:

Motion to Amend Payment Schedule(s)

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☒

(7) Result: Dismissed.

(8) Date of result (if you know): 6/9/2011

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☒

(2) Second petition: Yes ☐ No ☒

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

First motion voluntarily dismissed pursuant to agreement with government and no appeal rights granted in second motion.

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE:

- (a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Pursuant to U.S. vs. Simmons, 635 F.3d 140, No. 08-4475, 2011 WL 3607266 (4th Cir. 2011), the Defendant is factually and legally innocent of Count 4, Felon in Possession of a Firearm.

(b) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

- (2) If you did not raise this issue in your direct appeal, explain why:

United States v. Simmons, 635 F.3d 140, No. 08-4475, 2011 WL 3607266 (4th Cir. 2011) is a new law in this circuit.

(c) Post-Conviction Proceedings:

- (1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

- (2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state: N/A

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

United States v. Simmons is a new law in this circuit.

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

The issue of factual and legal innocence did not exist in this circuit prior to United States v. Simmons.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

(b) At arraignment and plea:

James D. Williams, Jr.

(c) At trial:

Irving L. Joyner

(d) At sentencing:

Irving L. Joyner

(e) On appeal:

(f) In any post-conviction proceeding:

James M. Ayers II

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

This motion is not barred by the one year Statute of Limitations because the United States v. Simmons was just decided in August 2011.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

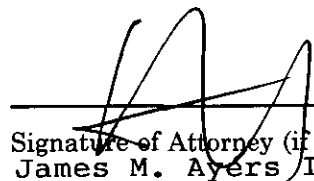
A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

That Count 4 be dismissed because the Defendant was not a felon at the time of entry of plea and is factually and legally innocent.

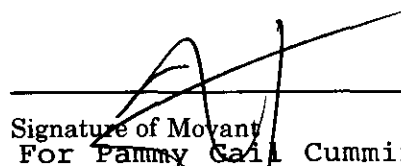
or any other relief to which movant may be entitled.



Signature of Attorney (if any)
James M. Ayers II

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct

Executed (signed) on 4-16-12 (date).



Signature of Movant
For Pammy Gail Cummings

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

Appointed Counsel per Standing Order 11-SO-3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon:

ERIC EVENSON
Assistant United States Attorney
Suite 800, Federal Building
310 New Bern Avenue
Raleigh, NC 27601-1461

by electronically filing the foregoing with the Clerk of Court on April 17, 2012, using the CM/ECF system which will send notification of such filing to the above.

This the 17th day of April, 2012.

/s/ James M. Ayers II
James M. Ayers II
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